APPENDIX A.

Decision and Order of United States Court of Appeals, Dated October 13, 1982.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 1141 August Term, 1982
Argued May 27, 1982 Decided October 13, 1982
Docket No. 82-7118

THOMAS W. CULLEN, Jr.,

Plaintiff-Appellee,

against

BMW OF NORTH AMERICA, Inc.,

Defendant-Appellant.

Before:

LUMBARD, MOORE, OAKES, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Honorable Edward R. Neaher, Judge, in favor of plaintiff-appellee

Thomas W. Cullen, Jr., in the amount of $18,000 plus interest, and from a judgment denying defendant's motion to amend the judgment.

Reversed.

Louis J. Castellano, Jr., Garden City, New Jersey, for Plaintiff-Appellee.

Kevin P. Hughes, New York, New York (Weil, Gotshal & Manges, Salem M. Katsh, Yvette Miller, Richard S. Taffet, Jonathan M. Hoff, of counsel), for Defendant-Appellant.

Rivkin Sherman and Levy, Washington, D.C. (Milton D. Andrews, Esq. and Lance E. Tunick, Esq., of counsel) for *Amicus Curiae,* Automobile Importers of America, Inc.

MOORE, *Circuit Judge:*

Defendant BMW of North America, Inc. ("BMW/NA") appeals from a judgment of the United States District Court for the Eastern District of New York, Honorable Edward R. Neaher, Judge, in favor of Thomas W. Cullen, Jr., in the amount of $18,000 plus interest, and from a judgment of that same court, denying defendant's motion to amend the judgment. BMW/NA is the exclusive importer and distributor in the United States of passenger cars, parts, and products manufactured by Bayerische Motoren Werke, AG. On appeal, BMW/NA claims that the district court erred in finding that it had breached a duty under New York law actively to police the methods of operation of its franchisee, Bavarian Auto Sales, Inc. ("Bavarian"), and had negligently permitted Bavarian to continue as a BMW dealer. We agree with BMW/NA that it did not owe a duty to supervise the operation of Bavarian and to terminate the franchise because of its allegedly precarious financial condition. Accordingly, we reverse the judgments of the district court.

FACTS

On January 24, 1979, Thomas W. Cullen, Jr., and his wife drove past the showroom of Bavarian and decided to shop for a car. Cullen selected a new 1978 BMW, Model 530i, at a price of $18,245, and placed a deposit of $245 on the vehicle. Although Cullen had originally been told that the car would not be available for seven to ten days, a Bavarian salesman called Cullen five days later, advising that the car had arrived and requesting a check for the balance of the purchase price. Cullen promptly remitted a check in the amount of $18,000, which was cashed by Bavarian. However, Cullen never received the automobile or the return of his money. In fact, Hans Eichler, Bavarian's president and owner of a 60 percent interest in the franchise, had stolen and absconded with Cullen's money. At no time relevant to the transaction, however, did Cullen have any contact, in person, by telephone, or by mail, with any representative of BMW/NA.

Cullen subsequently commenced a civil suit against Bavarian in New York State Supreme Court, Nassau County. The suit was stayed after Eichler filed a petition in bankruptcy. Cullen also filed criminal complaints with the Queens County District Attorney and the Attorney General of the State of New York, but no indictments were issued.[1] In addition, Cullen brought this action based on diversity grounds against BMW/NA.

Bavarian was operating as a franchised BMW dealer, with Eichler as its principal, when BMW/NA assumed control over the distribution of BMW automobiles in March, 1975. It continued to operate as a franchised BMW dealer until February 16, 1979 when the dealership ended.[2]

Pursuant to a standard operating agreement with BMW/NA, Bavarian was responsible for maintaining a

prearranged line of credit with a financial institution to be used exclusively for the purchase of BMW vehicles. Bavarian, however, permitted its line of credit to lapse. Prior to August, 1976, Bavarian had a line of credit with the State Bank of Long Island. On August 18, 1976, however, the bank informed BMW/NA that it had terminated its relationship with Bavarian because Eichler had advised the bank that he had arranged to handle Bavarian's credit requirements from personal resources. BMW/NA experienced difficulty, however, in receiving payment for cars and parts and placed Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976.

In June, 1977, BMW/NA received a letter from the Israel Discount Bank stating that effective June 16, 1977, Bavarian had established a line of credit for $200,000. From the latter part of 1976 through August 22, 1977, the Israel Discount Bank had paid for approximately eighty-seven vehicles purchased by Bavarian even though no formal letter of credit was in effect for most of this period. The bank also paid BMW/NA for another twenty-six vehicles between September 30, 1977 and December 27, 1977. The Israel Discount Bank continued as Bavarian's credit facility through the summer of 1978. The bank paid BMW/NA for fifty-three automobiles between January 1, 1978 and August 18, 1978. In the fall of 1978, however, the bank concluded that the dealership was experiencing financial difficulty and decided not to extend further credit. The bank's decision was in part based upon certain tax levies and other legal actions filed against the Bavarian franchise. BMW/NA was unaware, however, of any tax levies filed against Bavarian or the reasons behind the Israel Discount Bank's decision to terminate Bavarian's line of credit.

At approximately the time at which Bavarian lost its line of credit, BMW/NA began receiving an inceased number of customer complaints concerning the Bavarian franchise. These complaints ranged from the issuance of checks on accounts with insufficient funds to alleged delays in return of customer deposits. Although an investigaton by BMW/NA revealed that all complaints had been satisfactorily resolved and all checks were covered on re-presentation, BMW/NA remained disturbed by Bavarian's continued failure to satisfy certain requirements of its contract with BMW/NA, such as submitting monthly financial statements,[3] and the increased number of checks which Bavarian had issued on accounts with insufficient funds.[4]

Eichler attempted to reassure BMW/NA of Bavarian's financial viability, indicating that he was actively negotiating with a variety of financial institutions to obtain a line of credit. By mid-September, however, Bavarian still had not been able to secure credit funds, and BMW/NA met with Eicher to discuss the future of the franchise. After reviewing the dealership's file, BMW/NA concluded that it would be difficult to terminate the Bavarian franchise at that time, without adquate written documentation certifying the dealer's deficiencies and without providing Bavarian an opportunity to correct those deficiencies. Accordingly, BMW/NA granted Bavarian sixty days to cure all deficiencies, and BMW/NA personnel closely monitored the franchise during this period. BMW/NA continued to operate as a BMW dealer and service facility and maintained the minimum number of vehicles required by its contract with BMW/NA.

At Bavarian's request, the original sixty-day period was extended until November 14, 1978. On the following day, Eichler informed BMW/NA that he had verbal approval

from Citibank for credit and that he was awaiting confirmation. Although the Citibank commitment did not materialize, the Lloyd Capital Corporation ("Lloyd") advised BMW/NA, by letter dated December 7, 1978, that Bavarian had established a line of credit for $400,000 exclusively for BMW automobiles. Lloyd informed BMW/NA that the letter of credit had been withdrawn.[5] The seven vehicles were then removed from Bavarian and were reallocated to a nearby BMW dealer. Moreover, Friedrich Hanau, vice-president of BMW/NA, immediately wrote to Eichler, setting forth the company's position that unless Bavarian corrected its continuing deficiencies within an additional sixty days, BMW/NA would serve a notice of intent to terminate the franchise. Eichler responded on December 28, 1978, indicating that he was accelerating his efforts to obtain a line of credit, and expressing his desire to continue as a BMW dealer. In early January, 1979, however, Eichler advised BMW/NA that he desired to sell his franchise to another automobile dealer. This prospective purchaser submitted an application which BMW/NA, in early February, rejected for failing to satisfy BMW/NA's established standards for a new dealership.

On February 13, 1979, BMW/NA officials again met with Eichler to discuss the future of the franchise. At this meeting, BMW/NA officials learned that Eichler had accepted deposits from customers totalling approximately $100,000 and that he had used this money for his own purposes. Three days later, BMW/NA accepted Eichler's voluntary letter of resignation.

DISCUSSION

Cullen alleged at trial two theories of liability: (1) that Bavarian acted as BMW/NA's agent pursuant to principles of either actual agency or agency by estoppel; and

(2) that BMW/NA negligently permitted Bavarian to continue as a BMW dealer because it had knowledge of Bavarian's precarious financial condition.[6] The district court rejected the first theory of liability, finding that Cullen failed to prove the essential elements supporting a theory of agency by estoppel.[7] The court held, however, that BMW/NA was liable for damages under the negligence theory, finding that Cullen had met his "burden of proving facts which give rise to a legal duty on the part of BMW/NA, for the protection of its franchisee's customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise." *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 12 (E.D.N.Y. Oct. 28, 1981). In imposing a duty on BMW/NA, the district court found that BMW/NA "was apprised of Bavarian's propensity for unscrupulous business transactions," *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 25 (E.D.N.Y. Jan. 29, 1982), and that as a result, "BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence . . . ." *Id.* The court thus concluded that where a franchisor, such as BMW/NA, has a "reasonable opportunity to reduce the risk of foreseeable injury" caused by its franchisee, *id.*, but fails to terminate its franchisee or take other appropriate action, the franchisor is negligent and is liable for damages suffered by the ultimate consumer.

We conclude, however, that the district court improperly determined that Cullen's injury was reasonably foreseeable, and thus erred in finding BMW/NA liable for negligent failure to police the methods of operation of its independent franchisee and to terminate the franchise because of Bavarian's precarious financial condition.

"The law does not undertake to hold a person who is chargeable with a breach of duty toward another, with all the possible consequences of his wrongful act." *Lowery v. Western Union Telegraph Co.*, 60 N.Y. 198, 201 (1875). It is thus a well-established principle that foreseeablity of injury is an indispensable requisite of negligence, and that negligence exists only when there is a reasonable likelihood of danger as the result of the act complained of. *Ward v. State of New York*, 81 Misc.2d 583, 366 N.Y.S.2d 800 (N.Y. Ct. Cl. 1975). Accordingly, an intervening act, tortious or criminal, will ordinarily insulate a negligent defendant from liability when the subsequent act could not have been reasonably anticipted by the defendant. *Tirado v. Lubarsky*, 49 Misc.2d 543, 268 N.Y.S.2d 54 (N.Y. Civ. Ct.), *aff'd*, 52 Misc.2d 527, 276 N.Y.S.2d 128 (N.Y. App. Div. 1966).

Applying these principles to the instant action, we decline to hold BMW/NA negligent and liable for damages since it could not reasonably have anticipated the crimes committed by Bavarian's principal, Eichler. Although BMW/NA may have been aware of Bavarian's shaky financial condition, that knowledge alone gave BMW/NA no cause reasonably to anticipate that Eichler would either engage in any criminal activity or that he would abscond with customer funds. In fact, no amount of supervision by BMW/NA would have enabled it to foresee Eichler's thievery. Moreover, even though BMW/NA had notice that Bavarian had been the subject of customer complaints, most complaints were resolved, and the record does not demonstrate that there was any dishonesty or criminal intent associated with these incidents. Furthermore, we note that the district court's finding that Bavarian was an independently owned and operated dealership is sufficient to eliminate any question

of control by BMW/NA. BMW/NA had no financial interest in Bavarian, did not participate in the hiring or firing of its officers or employees, or dictate its sales practices. Accordingly, we conclude that BMW/NA, even though it had knowledge of Bavarian's precarious financial condition, was not liable to Cullen for his damages under a negligence theory since it could not have reasonably foreseen Eichler's criminal activity.

Reversed.

OAKES, *Circuit Judge* (dissenting):

I dissent because I believe, as did the trial judge, that the injury suffered by Cullen was foreseeable; I also believe that the majority fails to give the experienced trial judge's finding to that effect the deference to which it is entitled.

In this diversity case we are of course required to turn to New York law, and one cannot discuss the questions of duty and foreseeability without reference to *Palsgraf v. Long Island Railroad,* 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), where Cardozo stated that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *See also MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916) ("foresight of the consequences involves the creation of a duty"). Although the New York Court of Appeals was to say in *Pulka v. Edelman,* 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976) (parking garage not liable for pedestrian injury caused by exiting car), that "[f]oreseeability should not be confused with duty," four years later it stated in *Havas v. Victory Stock Paper Co.,* 49 N.Y.2d 381, 402 N.E.2d 1136, 426 N.Y.S.2d 233 (1980) (independent trucker's employee

could recover for injuries sustained while helping defendant's employee load waste paper onto truck), that "whether [the defendant] owed a duty to the plaintiff and, if it did, whether, in the face of it, [the defendant] failed to act in a reasonably prudent manner—turn largely on foreseeability." 49 N.Y.2d at 385, 402 N.E.2d at 1138, 426 N.Y.S.2d at 236. *Palsgraf*, quoted immediately thereafter by the *Havas* court, lives.

The majority opinion concludes that BMW of North America, Inc., should not be held liable for its dealer's defalcation of Cullen's money because that defalcation was "an intervening act, tortious or criminal." In other words, "no amount of supervision by BMW/NA would have enabled it to foresee [the dealer's] thievery." But New York law provides, as the common law of England before it provided, that "the criminal conduct of a third person [does] not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard." *Nallan v. Helmsley-Spear, Inc.*, 50 N. Y. 2d 507, 520-21, 407 N. E. 2d 451, 459, 429 N. Y. S. 2d 606, 614 (1980); *Scott v. Shepherd*, 96 Eng. Rep. 525, 526 (C.P. 1773) ("The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages.").

BMW/NA sells its vehicles to the public only through dealerships. It was well aware of this dealer's habit of passing worthless checks and its inability to obtain regular financing through established commercial channels. BMW/NA protected itself by demanding and receiving only certified checks for any goods ordered by its dealer. But consumers were left to fend for themselves, while the BMW/NA dealer, armed with all the indicia of an ongoing BMW dealer from order pads to location, sign, vehicles, and parts, continued to solicit orders and accept deposits

from customers. The dealer's "thievery" was sufficiently foreseeable to BMW/NA that *it* insisted upon certified checks before delivery. Why was such thievery not equally foreseeable insofar as BMW customers were concerned?

Moreover, as the New York Court of Appeals has so cogently indicated, liability concepts have broadened to reflect economic, social, and political developments. *See, e.g., Micallef v. Miehle Co.*, 39 N. Y. 2d 376, 385, 348 N. E. 2d 571, 577, 384 N. Y. S. 2d 115, 121 (1976); *Codling v. Paglia*, 32 N. Y. 2d 330, 340, 298 N. E. 2d 622, 627, 345 N. Y. S. 2d 461, 467-68 (1973). Allowing a defendant to shield itself from liability by conducting operations exclusively through "independent" franchisees ignores the clear "trend of the law . . . to expand the liability of an enterprise to . . . third persons injured because of activities carried on in behalf of the enterprise." Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, 19 Stan. L. Rev. 76, 76 (1966). *See also* Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L. J. 1, 76-77 (1980). Moreover, BMW/NA was in a much better position than was Cullen to determine the financial bona fides of the dealer; indeed, the only real evidence the consumer has of an automobile dealer's financial integrity is the imprimatur given the dealer by the automobile company itself—logos, trademarks, advertising layouts, cars (though here the dealer bought cars from other dealers), and parts, and, most important of all, the continuation of the dealership. Automobile company advertising customarily emphasizes the service, reliability, and intergrity of the company's dealers. Liability here can also fairly be defended as involving a measure of risk-spreading, it seemingly being fairer to saddle the franchisor with the "cost" of distribution involved in an occasional dealer's failure than to saddle the unfortunate consumer who relied upon the very existence of the franchise to put down his good money.

Thus I agree with Judge Neaher that the dealer's thievery was foreseeable and that though it was an intervening act it nevertheless did not absolve BMW/NA of responsibility; in *Scott v. Shepherd* terms, the very existence of the dealership was a squib in a crowded market.

But foreseeability is also peculiarly a question of fact. As the New York Court of Appeals said in *Havas*, 49 N. Y. 2d at 388, 402 N. E. 2d at 1139, 426 N. Y. S. 2d at 237, "[i]t [is] particularly appropriate to leave this issue" to the finder of fact. *See also* 2 F. Harper & F. James, *The Law of Torts* §18.8, at 1059 (1956) ("Reasonable foreseeability of harm is the very prototype of the question the jury must pass upon in particularizing the standard of conduct in the case before it."). I had supposed that the reason we have Fed. R. Civ. P. 52(a), which tells us that a district court's findings should withstand appellate review unless clearly erroneous, is to give the district court as trier of fact the same range of determination as we give a jury. Interestingly, only last April the Supreme Court not very gently reminded the courts of appeals that Rule 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. . . . [I]n particular, it does not divide findings of fact into . . . 'ultimate' and . . . 'subsidiary' facts." *Pullman-Standard v. Swint*, 50 U.S.L.W. 4425, 4429 (U. S. Apr. 27, 1982) (No. 80-1190). Thus because I do not think that the district court's finding of foreseeability was clearly erroneous, I would affirm even if I had some doubt on the foreseeability question. But in light of the applicable New York cases, I do not have even such a doubt.

And if the entire issue were restated in terms of duty rather than in terms of foreseeability, as the New York Court of Appeals in *Pulka v. Edelman, supra*, suggested may be a separate and distinct question (*sed quaere*), I

would refer only to *Hendrickson v. Hodkin,* 276 N. Y. 252, 11 N. E. 2d 899 (1937) (holding a hospital liable for permitting a quack doctor to treat a patient on its premises); *De Ryss v. New York Central Railroad Co.,* 275 N. Y. 85, 9 N. E. 2d 788 (1937) (landowner who permits a third person to hunt under circumstances indicating to a reasonably prudent man that it is dangerous to do so is liable to others injured as a result); and Note, *Liability of a Franchisor for Acts of the Franchisee,* 41 S. Cal. L. Rev. 143 (1968). Here BMW/NA clearly could have terminated the dealership and indeed had a duty to do so in light of the dealer's instability and unscrupulousness, before the dealer took Cullen's deposit.[1]

FOOTNOTES

[1] Eichler and Bavarian were indicted, however, for three counts of grand larceny in the second degree based on Eichler's conduct toward customers other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

[2] Bavarian and BMW/NA entered into three written franchise agreements from June, 1976 to February 16, 1979: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods.

[3] Bavarian furnished only two monthly financial statements during the several years it operated.

[4] During 1978, checks totalling $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

[5] Bavarian had never signed a formal agreement with Lloyd and have never paid Lloyd the $1,000 required by law to be submitted prior to the execution of the agreement.

[6] Cullen's amended complaint alleged four separate theories of liability: (1) that Bavarian was acting as agent for BMW/NA pursuant to principles of either actual agency or agency by estoppel; (2) that BMW/NA was negligent in permitting Bavarian to continue as a dealer because it had knowledge of Bavarian's allegedly precarious financial condition; (3) that BMW/NA entered into a conspiracy with Eichler, and in fact did, defraud customers into doing business with Eichler; and (4) that BMW/NA's conduct constituted a prima facie tort. At the conclusion of discovery, BMW/NA moved for summary judgment dismissing each of Cullen's claims for relief. The district court concluded that an actual agency relationship did not exist between BMW/NA and Bavarian. It also found no evidence to support Cullen's causes of action for conspiracy to commit fraud and prima facie tort, and dismissed those claims as well. Accordingly, only the issues of negligence and agency by estoppel remained to be tried.

[7] The court specifically pointed to Cullen's failure "to prove his reliance on Bavarian's *authority to act* for BMW/NA." *Cullen v. BMW of North America, Inc.*, No. 79 C 970, slip op. at 8 (E.D.N.Y. Oct. 28, 1981) (emphasis in original). Cullen's cross-appeal from the dismissal of this claim for relief was withdrawn pursuant to a stipulation dated March 11, 1982 and filed on March 26, 1982. Accordingly, we need not address this issue on appeal.

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I concur.

J. E. L.
9/2/82

Cullen v. BMW of North America, Inc.—Docket No. 82-7118
James L. Oaks dissents with opinion.

Oct. 5, 1982

'I would agree with the district court that there would be no violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976), by termination in this case. *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F. 2d 52 (4th Cir. 1974), *cert. denied*, 420 U. S. 992 (1975). It may not be amiss to say that I am extremely confident that the author of the majority opinion would not disagree with this conclusion either. *See Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F. 2d 425 (2d Cir.), *cert. denied*, 371 U. S. 829 (1962).

APPENDIX B.

Order of United States Court of Appeals, Dated December 6, 1982.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of December, one thousand nine hundred and eighty-two.

THOMAS W. CULLEN, Jr.,

Plaintiff-Appellee,

v.

BMW OF NORTH AMERICA, Inc.,

Defendant-Appellant.

No. 82-7118

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Thomas W. Cullen, Jr.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Oakes dissenting.

It is further noted that the suggestion for hearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk
by: FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX C.

Decision and Order of Neaher, U. S. D. J., Dated January 29, 1982.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

THOMAS W. CULLEN, Jr.,

Plaintiff,

against

BMW OF NORTH AMERICA, Inc.,

Defendant.

No. 79 C 970

Appearances:

Louis J. Castellano, Jr., Esq., Garden City, New York, Attorney for Plaintiff.

Weil, Gotshal & Manges, New York, N.Y., Attorneys for Defendant. By Kevin P. Hughes, Esq., Yvette Miller, Esq., Joseph Allerhand, Esq.

NEAHER, District Judge.

Following the Court's memorandum of decision and order dated October 28, 1981, defendant timely sought amendment of the judgment. Rules 52(b) and 59(e), F.R.Civ.P. The application has been considered, but after careful study of defendant's arguments in support of its motion, the Court adheres to its decision, revising the opinion as follows to reflect the additional authority which it believes supports the original decision.

Plaintiff, Thomas W. Cullen, Jr., seeks to recover $18,000 with interest, plus punitive damages, paid to Bavarian Auto Sales, Inc. (Bavarian), a BMW dealer formerly franchised by defendant, BMW of North America, Inc. (BMW/NA). BMW/NA is "the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by Bayerische Motoren Werks, AG." Plaintiff's Exhibit 93. A Delaware corporation, BMW/NA has its principal place of business at Montvale, New Jersey. This diversity action is now before the Court subsequent to partial summary judgment in favor of defendant and trial without a jury on the remaining issues.[1]

The facts established at trial follow. On January 24, 1979 Cullen entered into a sales contract with Bavarian for a new 1978 BMW, Model 530i, at a price of $18,245. Having paid a deposit of $245, Collen received a call five days later from the salesman advising that the car had arrived and requesting a check for the balance of the purchase price. Plaintiff remitted a check for $18,000, which was cashed by Bavarian, but never received the car or the return of his money.

Cullen commenced a civil action against Bavarian in New York State Supreme Court, Nassau County, which was stayed when Bavarian's president, Hans Eichler, filed a petition in bankruptcy. Cullen also filed criminal complaints with the Queens County District Attorney and the

Attorney General of the State of New York, although no indictments were issued.[2] This action was subsequently commenced.

Bavarian operated continuously as an authorized BMW dealer from at least June of 1976 to February 16, 1979, on which date Eichler voluntarily terminated all agreements between Bavarian and BMW/NA. Three written franchise agreements were entered into during this time: (1) from June 1 to December 31, 1976; (2) from August 12 to December 31, 1977; and (3) from January 1 to December 31, 1978. Although no written agreement was in effect from January 1 to August 12, 1977 or from January 1 to February 16, 1979, Bavarian continued to operate as a duly franchised BMW dealer during these periods. In fact, recognizing the continuation of dealerships without formal agreement is not an unusual practice for BMW/NA. Trial Transcript at 2.125-26.

From the beginning of Bavarian's relationship with BMW/NA, the latter received indications of Bavarian's financial instability. For example, difficulty in receiving payment for cars and parts prompted BMW/NA to place Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976. Additionally, despite Bavarian's contractual obligations and BMW/NA's repeated requests, Bavarian furnished only two monthly financial statements during the several years it operated. Further, from 1976 onward, Bavarian demonstrated persistent difficulty in maintaining minimum credit lines essential to standard operation of BMW dealerships. Finally, throughout the operation of the franchise Bavarian repeatedly failed to maintain sufficient funds to enable legitimate issuance of checks to BMW/NA, other BMW dealers, and customers.

During the latter part of 1978, Bavarian's instability escalated, and BMW/NA received intensified indications

of its financial irregularities and irresponsibility. For example, from July to September 1978, BMW/NA received five customer complaints against Bavarian, each of which alleged Bavarian had taken partial payment for a car but had neither delivered the vehicle nor refunded the payment. In some of these cases, Bavarian had issued checks on insufficient funds to refund deposits made by the customers. Further, during 1978, checks aggregating some $40,000 were issued by Bavarian to BMW/NA upon accounts with insufficient funds.

On October 30, 1978, BMW/NA extended an initial sixty-day period granted Bavarian to re-establish its financial viability. This period was extended to November 14, 1978, but Bavarian still failed to remedy its deficiencies by that date.

On November 15, 1978, Bavarian represented to BMW/NA that approval of funds from the Small Business Administration and Citibank was imminent, but no such approval ensued. On December 7, 1978, BMW/NA received notice from Lloyd Capital Corporation that Bavarian had established a line of credit, but a week later BMW/NA learned that Eichler had misrepresented his intention to follow through with the credit application process, had never signed a formal agreement with Lloyd, and had never paid Lloyd the $1000 required by law to be submitted prior to execution of the agreement.

In a letter dated December 18, 1978, BMW/NA notified Eichler that because of "serious and continuing deficiencies" in the dealership, BMW/NA would not offer him a 1979 dealer agreement. The deficiencies outlined in the letter were: (1) failure to observe minimum wholesale credit requirement; (2) impairment of financial reputation, including issuance of checks, later dishonored, to other BMW dealers; (3) parts accounts arrearages, including issuance of checks, later dishonored, to BMW/NA; (4)

failure to observe parts inventory requirements; and (5) failure to submit year-end and monthly financial and operating statements.

Although Eichler responded to the above letter on December 29, 1978, expressing his desire to continue the dealership, BMW/NA did not reply to confirm either termination or extension of the franchise. The next contact evidences BMW/NA's recognition of the continued operation of the Bavarian franchise: it refused to authorize Eichler's proposed sale of Bavarian to an existing dealer. Had BMW/NA asserted its rights under the dealer agreement, which had expired by its own terms on December 31, 1978, it could have insisted that Bavarian remove at its own expense all BMW signs displayed publicly, refrain from using BMW trademarks, destroy all printed material bearing BMW trademarks, and cease to hold itself out as an authorized BMW dealer. Plaintiff's Exhibit 103. Further, BMW/NA could have required Bavarian to sell and deliver to BMW/NA all new BMW vehicles, parts and tools purchased by Bavarian from BMW/NA. Instead, BMW/NA allowed Eichler to continue holding out Bavarian as an authorized dealership, as evidenced by the BMW logo publicly displayed on the outside of the showroom and the use of printed materials bearing BMW trademarks.

It should be noted that August 1978 was the last time BMW/NA received payment for any cars allocated to Bavarian. Further, in December 1978 BMW/NA removed all cars it had delivered to Bavarian for failure to maintain a minimum credit structure. Yet, during January and February of 1979, the showroom contained several new BMW vehicles borrowed from other dealers, thus giving Bavarian the appearance of a viable ongoing business.

On February 13, 1979, a meeting was held to discuss the future of Bavarian. This meeting was approximately two

weeks after Cullen had been denied delivery of the car, and although Cullen had not contacted BMW/NA, at the meeting BMW/NA was apprised of information that Eichler had accepted deposits from seven customers totalling $100,000 and had used the money for other purposes. Still, BMW/NA made no definitive response, and three days later Eichler voluntarily resigned the franchise. Only at that point did BMW/NA pursue its rights subsequent to termination outlined above.

The record is clear that Bavarian was an independently owned and operated dealership, but plaintiff seeks to hold BMW/NA liable under the doctrine of agency by estoppel. This theory must fall for lack of proof of its essential elements. It is well settled that agency by estoppel arises only when the party charged as principal intentionally or carelessly causes the belief that the putative agent is authorized to bind that party. *Karavos Compania Naviera S.A v. Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978); Restatement of Agency 2d §8B; 2 N.Y.Jur., Agency §§25, 87. Moreover, under New York law,

> "apparent or ostensible authority, or agency by estoppel is created only by acts or neglects of the person sought to be charged as principal, and the person dealing with the ostensible agent must have known of and relied upon such acts or omissions, and such reliance must be in good faith and in the exercise of reasonble prudence." *Perry v. New York Life Ins. Co.*, 22 N.Y.S.2d 696, 701-02 (Sup. Ct. 1940).

Although plaintiff offered into evidence various public manifestations of a relationship between Bavarian and BMW/NA, he failed to prove his reliance on Bavarian's *authority to act* for BMW/NA. Similarly, there is no

evidence of Cullen's belief that the transaction was entered into by or for BMW/NA. On the contrary, plaintiff's own testimony shows there was an absence of reliance on advertisements, on the similarity between the corporate names of Bavarian and BMW/NA (Bavarian Motor Works), or on the BMW logo appearing on the sales slip.

Plaintiff did testify as to his reliance on the BMW logo appearing on the outside of Bavarian's premises, but the question remains to what his reliance was directed. The testimony shows not a belief that Bavarian had authority to act for BMW/NA, but that the BMW logo represented a particular quality of cars sold at Bavarian. Since this testimony indicates, at most, Cullen's reliance on Bavarian's authority to sell BMW automobiles, plaintiff failed to carry its burden of proving the belief essential to agency by estoppel.

Turning to plaintiff's negligence theory, the evidence adduced at trial shows that BMW/NA unreasonably permitted Bavarian to continue holding itself out to the public as an authorized BMW dealer, and to purport to sell Cullen a car, during a period in which defendant had ample knowledge of Bavarian's precarious financial condition and history of questionable business practices. Yet, proving the unreasonableness of defendant's conduct does not establish actionable negligence. To accomplish the latter plaintiff must first sustain his burden of proving the breach of a legal duty owing by defendant to plaintiff, a violation of plaintiff's rights. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Defendant argues that BMW/NA owed Cullen no duty to enforce the provisions of its agreement with Bavarian, based on plaintiff's inability to claim as a third-party beneficiary under that contract. The argument is correct as far as it goes, for it is true that the parties to the agreement, in establishing their distributer/dealer relationship,

expressed no intent to confer a direct benefit on ultimate consumers. In the absence of such expression, plaintiff assumes the status of an incidental beneficiary, unable to enforce contractual rights or recover for failure to perform contractual duties. *Bernal v. Pinkerton's, Inc.*, 52 App. Div. 2d 760, 382 N.Y.S.2d 769 (1st Dept. 1976), *aff'd*, 41 N.Y.2d 938, 363 N.E.2d 362, 394 N.Y.S.2d 638 (1977); *Beck v. FMC Corp.*, 53 App. Div. 2d 118, 385 N.Y.S.2d 956 (4th Dept. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977).

Nevertheless, the question remains whether BMW/NA owes the ultimate consumer a duty beyond its contractual obligations. Because neither the State judiciary nor legislature has addressed this precise question, the requirement that this Court, sitting in diversity, apply the substantive law of New York, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), leads to a perplexing problem. However, both the Supreme Court and the Second Circuit have provided guidance for federal courts faced with the absence of applicable State law.

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), the majority of the Court held that the issues presented regarding a contractual arbitration provision concerned a matter of substantive law; therefore, *Erie* mandated application of State law to the agreement. Justice Frankfurter, concurring in the result, commented on the *Erie* doctrine as follows:

> "One of the difficulties, of course, resulting from *Erie R. Co. v. Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created

> rights and state policies going to the heart of those rights. . . As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law."

Id. at 208-09 (Frankfurter, J., concurring) (footnote omitted). See also *King v. Order of Travelers,* 333 U.S. 153, 160-61 (1948).

Similarly, in *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967), the majority of the Court held that where no decision by a State's highest court exists with respect to characterization of a property interest for purposes of estate tax liability, federal courts must apply "what they find to be the state law":

> "This is but an application of the rule of *Eric R. Co. v. Tompkins, supra,* where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956)." *Id.* at 465.

In the Second Circuit, the Court of Appeals has expressed its "established position" as follows:

> "[W]hen a federal court must determine state law, it should not slavishly follow lower or even upper court decisions but ought to consider all the data the highest court of the state would use. See Corbin, The Laws of the Several States, 50 Yale L.J. 762 (1941). Such is the established position of this court."

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967) (on petition for rehearing) (*per curiam*).

More recently, the Court of Appeals has reaffirmed the principle explained in *Roginsky:*

> "When there is an absence of state authority on an issue presented to a federal court sitting in diversity, as has occurred here, the federal court must make an estimate of what the state's highest court would rule to be its law."

Cunninghame v. Equitable Life Assurance Society, 652 F.2d 306, 308 (2d Cir. 1981). *Accord, Huie v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977); *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir. 1976).

In light of the foregoing authorities, the Court is faced with the difficult task of predicting the manner in which the New York Court of Appeals would respond to identical circumstances. Since it appears no New York decision addresses the issue of negligent supervision in the context of franchise or distributor operations, we must look to applicable principles of tort liability as perceived by the New York Court of Appeals.

The question of duty turns on "whether the defendant is under any obligation for the benefit of the particular plaintiff." Prosser, Law of Torts §53, at 324 (4th ed. 1971). In the word of then Chief Judge Cardozo, such a

relation between the parties can be founded upon the foreseeability of harm:

> "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

Palsgraf v. Long Island R.R., supra at 344, 162 N.E. at 100.

Two recent New York decisions, *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 402 N.E.2d 1136, 426 N.Y.S.2d 233 (1980), and *Pulka v. Edelman,* 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976), are instructive in that they appear to set bounds on the recognition of duty based on foreseesability.

In *Havas,* plaintiff, an employee of Morgan Guaranty Trust Co., was injured while assisting other trust company employees in loading bales of waste paper on a truck owned and operated by defendant, a paper stock company. Plaintiff sued the paper company on a negligence theory, and defendant impleaded plaintiff's employer. The duty of the trust company toward its employees was not at issue; rather, the Appellate Division overturned the jury verdict for plaintiff on the ground that no relation existed between the defendant paper company and plaintiff from which a duty of care could arise:

> "Given the undisputed factual pattern recited above we cannot perceive any duty or obligation running from defendant Victory to plaintiff Havas . . . . The loading operation was carried out by Morgan employees under the supervision of plaintiff, himself a Morgan employee. The ramp belonged to Morgan and Morgan gave the order or

> direction to plaintiff to use the same despite the latter's judgment that he should not. Victory's driver made no decisions as to how the bales should be loaded nor did he participate in the method of loading."

Havas v. Victory Paper Stock Co., 66 App. Div. 2d 953, 954, 411 N.Y.S.2d 452, 453 (3rd Dept. 1978).

The Court of Appeals reversed, finding that defendant owed a duty to plaintiff based solely upon the foreseeability of the risk of harm to plaintiff and defendant's relation to the circumstances. The court identified the analytical framework through which the existence of duty must be examined notwithstanding the absence of an independently cognizable relation between the parties:

> "[I]n a case which raises such traditional negligence law queries as does the one before us the answers are still to be found in the principle so pungently phrased by Cardozo that '[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation' (*Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 399, 344, 162 N.E. 99, 100). Or, as it is spelled out more precisely in the English case that is the progenitor of the foreseeability principle, '[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger' (*Heaven v. Prender*, 11 QBD 503, 509, Britt, MR [1883])."

Havas v. Victory Paper Stock Co., 49 N.Y.2d at 386, 402 N.E.2d at 1138, 426 N.Y.S.2d at 236.

The analysis in *Havas* appears to be two-fold. First, the risk of injury to plaintiff must be reasonably foreseeable. Second, the court must determine whether the defendant "bore such a relation to the circumstances as to saddle it . . . with a duty to avoid the danger to be anticipated." *Id.* at 387, 402 N.E.2d at 1139, 426 N.Y.S.2d at 237. The precise circumstances in *Havas* are wholly distinct from the instant claim. Yet the process of analysis remains constant. The central idea is that the defendant, through its driver, "had a voice in directing the conduct" of the loading operation; therefore, defendant owed a duty to avoid subjecting plaintiff to the foreseeably hazardous situation to which the driver "at least acquiesced." *Id.*

In *Pulka,* the court examined the same issue, *viz.*, whether a duty may arise from foreseeability of harm, but reached the opposite conclusion. Plaintiff, a pedestrian, was struck by an automobile exiting from defendant's parking garage. The driver of the vehicle, not a garage employee, indisputably owed a duty to the plaintiff. But the question on appeal was whether the common practice of the garage patrons of exiting without checking for pedestrians gave rise to a duty owing pedestrians by the defendant garage to take preventive measures.

Holding that no duty existed, the majority of the court examined the two possible grounds upon which the duty to control others arises:

> "Commentators have pointed out that the duty to control others arises only in the following relationships: (1) '[t]he relationship between the defendant and the person who threatens the harm to the third person may be such as to require the

> defendant to attempt to control the other's conduct' or (2) 'there may be a relationship between the defendant and the person exposed to harm which requires the defendant to afford protection from certain dangers including the conduct of others' (Harper & Kime, Duty to Control the Conduct of Another, 43 Yale L.J. 886, 887-888)."

40 N.Y.2d at 783, 358 N.E.2d at 1021, 390 N.Y.2d at 395.

Thus, according to *Pulka,* the relationship between the defendant and either the third-party wrongdoer or the plaintiff may give rise to a duty of care. On the facts, the majority of the court found insufficient relation between the garage and the patron-driver to impose a duty, focusing on the defendant's lack of "reasonable opportunity" to control the patron and prevent the risk of harm. Further, in distinguishing the respective responsibilities of the driver and the garage, the court again focused on the concept of the defendant's opportunity to affect the degree of risk of harm:

> "Although it is reasonable to require one person to be responsible for the negligent conduct of another in some instances, it is unreasonable to impose the duty where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the negligent conduct."

Id. at 785, 358 N.E.2d at 1022, 390 N.Y.2d at 396.

Finally, the majority in *Pulka* expressed concern with the creation of legal duty based solely upon foreseeability, stating that foreseeability determines "the scope of duty

—only after it has been determined that there is a duty." *Id.* Taking what appears to be a different stance than the *Havas* majority, the court in *Pulka* appears to have concluded that since no relationship existed from which a duty could attach, foreseeability alone could not provide a basis for liability.

Yet the seeming conflict between the decisions in *Havas* and *Pulka* can be rationally resolved. The court in *Pulka* appears understandably reluctant to impose liability on a party who had insufficient relation to the wrongdoer or the plaintiff to prevent the harm. Mere foreseeability without relation cannot suffice. The distinction in *Havas* is the absence of a third-party wrongdoer. Without the additional actor between plaintiff and defendant, the analysis in *Havas* turns on the defendant's relationship to the circumstances. Liability in *Havas* was imposed because defendant had a direct voice in the risk involved, whereas, in *Pulka,* the absence of defendant's reasonable opportunity to mitigate the harmful conduct of departing motorists precluded imposition of legal duty. The essential issue in each case is identical: Does the defendant, who is at least partially responsible for the presence of hazardous circumstances or conduct have the capability to affect the degree of the risk of harm? If his relationship to either the circumstances or the intervening wrongdoer is such that he has reasonable opportunity to reduce the risk of foreseeable injury, a duty arises to do so.

Application of the foregoing principles leads this Court to conclude that the New York Court of Appeals would recognize a legal duty running from BMW/NA to plaintiff to prevent the risk of harm to BMW customers which results when dealers, whose financial instability and unscrupulous business practices are known to BMW/NA, are permitted to maintain the appearance of a responsible authorized BMW dealer subsequent to termination of the

dealer agreement. The instant circumstances appear well within the bounds set by the court in *Pulka*. Not only did there exist a significant relationship between BMW/NA and Bavarian, defendant had ample opportunity to prevent Bavarian from wrongfully obtaining plaintiff's money while holding itself out as an authorized dealer.

As the facts indicate, upon expiration of the dealer agreement, three weeks prior to the sales contract with plaintiff, defendant could have caused Bavarian to remove all BMW signs, refrain from using BMW trademarks and printed materials, and cease operating as an authorized BMW dealer. Thus, as in *Havas*, defendant acquiesced to circumstances which it should have reasonably known presented a substantial risk of harm to plaintiff. Most importantly, defendant had both opportunity and capability to decrease or foreclose the risk of harm. Therefore, a duty of care arose to avoid subjecting BMW customers to the unreasonable exposure to financial injury.

Since plaintiff has met its initial burden of proving facts which give rise to a legal duty on the part of BMW/NA for the protection of its retail customers, we turn now to defendant's argument that there was no breach of that duty.

Defendant, in sum, argues that BMW/NA was prohibited by law from terminating the franchise on the basis of Bavarian's known financial deficiencies. Citing 15 U.S.C. §§1221-25 and N.Y. Gen. Bus. Law §§195-98, defendant claims that in the circumstances of this case Bavarian could have successfully sued to enjoin any such termination. This argument fails for several reasons. First, the federal statute cited applies only to automobile manufacturers, and not to distributors in the absence of an indication of control by the manufacturers. See, *e.g.*, *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir. 1973). Second, BMW/NA's right to terminate becomes moot in light of the expiration of the dealer agreement on

December 31, 1978. Third, the prohibition in N.Y. Gen. Bus. Law §197-a against refusal to renew automobile dealer agreements provides a good faith exception, and defendant has cited no case which enjoins such refusal under circumstances as egregious as those outlined in BMW/NA's letter dated December 18, 1978, Plaintiff's Exhibit 43.

Stripped of its purported legal barriers to definitively respond to Bavarian's continued deficiencies and questionable business practices, defendant is left without justification for failure to discharge its duty. The evidence shows that BMW/NA unreasonably allowed Bavarian to continue using the BMW name after expiration of the dealership and after notice of Eichler's propensity for unscrupulous business dealings. The evidence further shows that BMW/NA failed to supervise the operation of the franchise during this period of Bavarian's undefined existence and increased risk to customers. Plaintiff thus proved defendant's breach of duty.

Turning to the issue of causation, defendant contends that plaintiff's injury was not a reasonably foreseeable result of BMW/NA's negligence. Citing law "long established in New York," defendant argues that Eichler's conduct constitutes an intervening criminal act and hence necessarily breaks the causal chain, insulating defendant from liability. See, *e.g., Lowery v. Western Union Telegraph Co.*, 60 N.Y. 198 (1875).

Such a rule is by no means established in New York. Determination of proximate cause ultimately turns "upon the precise factual pattern of each individual case." *Hoggard v. Otis Elevator Co.*, 52 Misc. 2d 704, 707, 276 N.Y.S.2d 681, 686 (Sup. Ct. 1966), *aff'd mem.*, 28 App. Div. 2d 1207, 285 N.Y.S.2d 262 (1st Dept. 1967). See also *O'Neill v. City of Port Jervis*, 253 N.Y. 423, 433, 171 N.E.

694, 697 (1930). Moreover, an intervening act, tortious or criminal, will insulate a negligent defendant from liability only when the subsequent act could not have been reasonably anticipated by the first actor. *Lillie v. Thompson,* 332 U.S. 459 (1947); *Sherman v. Concourse Realty Corp.,* 47 App. Div. 2d 134, 365 N.Y.S.2d 239 (2nd Dept. 1975); Restatement of Torts 2d §§302B, 448-49.

The New York Court of Appeals has stated the rule as follows:

> "In this regard, it was plaintiffs' burden to show that defendants' conduct was a substantial causative factor in the sequence of events that led to [the] injury (see Restatement, Torts 2d §430; Prosser, Torts [4th ed.], §42). Of course, the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard (see Restatement, Torts 2d, §§302B, 449; Prosser, Torts [4th ed.], at pp. 271-272)."

Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 520-21, 407 N.E.2d 451, 459, 429 N.Y.S.2d 606, 614 (1980).

Thus, the first step of analysis is to ascertain whether defendant's conduct was a substantial factor in bringing about plaintiff's harm. In other words, the Court must determine whether a reasonable person would regard BMW/NA's negligence a cause of Cullen's harm in the sense that it was "responsible" for the injury. *Hoggard v. Otis Elevator Co., supra,* 52 Misc. 2d at 707, 276 N.Y.S.2d at 686; Restatement of Torts 2d §433, Comment (a), at 429.

Here, the evidence shows that BMW/NA created a situation which afforded Bavarian the opportunity to defraud or steal from customers relying on the good reputation of BMW. Cullen walked into the showroom specifically relying on the publicly displayed BMW logo as representing a particular level of quality product. The situation here was such as to give him no notice of any deficiency in the franchise or Bavarian's relationship with BMW. BMW/NA, on the other hand, was well aware of Bavarian's impairment of BMW's reputation through various acts enumerated in the letter of December 18, 1978, yet it failed to take the available steps to prevent the further misuse of the BMW name and the misrepresentation that Bavarian continued to be an authorized BMW dealer. Moreover, knowing Bavarian's tenuous situation after expiration of the dealer agreement on December 31, 1978, BMW/NA failed to supervise its business dealings, thereby allowing Cullen to transact business with a "paper" BMW dealership lacking any tie with BMW whatsoever. These facts show that BMW/NA's conduct constituted a "substantial causative factor" in plaintiff's harm.

The second step under *Nallan v. Helmsley-Spear, Inc., supra,* requires the Court to determine whether Bavarian's intervening act was itself a foreseeable risk of BMW/NA's negligence. Stated differently,

> "a wrongdoer must answer for all the consequences that may ensue in the ordinary course of events, even though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated

> to produce the injurious result. The type of intervening cause which relieved all original wrongdoings is a cause which interrupts the natural sequence of events, so as decide their course, prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated."

Hoggard v. Otis Elevator Co., supra, 52 Misc. 2d at 708, 276 N.Y.S.2d at 687-88 (citations omitted).

The facts in evidence show that BMW/NA had knowledge of at least five recent incidents prior to Cullen's in which Bavarian had received partial payment for automobiles and had not delivered the cars. In some of these cases, Bavarian had issued checks on insufficient funds to refund the payments. Although the customer complaints were subsequently resolved, BMW/NA was apprised of Bavarian's propensity for unscrupulous business transactions. In this light, Eichler's conduct perpetuated rather than interrupted the "natural sequence of events" stemming from defendant's negligence. Moreover, "the exact occurrence or the precise injury" need not be foreseen. *Horstein v. General Motors Corp.*, 391 F. Supp. 1274, 1277 (S.D.N.Y. 1975). BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence, and this is sufficient.

According to the foregoing, judgment is entered for plaintiff in the amount of $18,000 plus interest thereon at the rate of 12% from April 13, 1979. Based on the evidence adduced at trial, punitive damages do not seem appropriate.

So Ordered.

The Clerk of the Court is directed to enter judgment for plaintiff and to forward copies of this memorandum of decision on reargument and order to counsel for the parties.

Dated: Brooklyn, New York
January 29, 1982

EDWARD R. NEAHER
U.S.D.J.

FOOTNOTES

[1]In *Cullen v. BMW of North America, Inc.*, 490 F. Supp. 246 (E.D.N.Y. 1980), we granted in part defendant's motion for summary judgment, leaving for further development of facts the issues of agency by estoppel and negligence discussed herein.

[2]Eichler and Bavarian were indicted for three counts of grand larceny in the second degree, the record of which was filed in the New York Supreme Court, Queens County, on March 6, 1980. Plaintiff's Exhibit 4. But apparently the indictments refer to conduct by the accused toward individuals other than Cullen. On February 5, 1981, Eichler pleaded guilty to attempted grand larceny in the second degree.

APPENDIX D.

Letter of BMW of North America, Inc., to Bavarian Auto Sales, Inc., Dated December 18, 1978.

BMW OF NORTH AMERICA, INC.

December 18, 1978

Bavarian Auto Sales, Inc.
51-17 Queens Boulevard
Woodside, N.Y. 11377

Attention: Mr. Hans W. Eichler, President

Dear Mr. Eichler:

BMW of North America, Inc. is presently distributing its new 1979 Dealer Agreement to all dealers who meet its minimum operating and financial standards. As you have been previously informed, your dealership has serious and continuing deficiencies, as a result of which you do not meet the minimum standards for a BMW dealership. Accordingly, we are unable to offer you a 1979 Dealer Agreement.

We are indicating below the deficiencies in your dealership which will have to be corrected for you to continue as a BMW dealer:

1. *Failure to Observe Minimum Wholesale Credit Requirement*—Section 1 (b) of your 1978 Dealer Operating Requirements Agreement.

As you are no doubt aware, pursuant to your 1978 Dealer Operating Requirements Agreement, which is a part of your 1978 Dealer Agreement, you undertook to

maintain a minimum wholesale credit line of $130,000 exclusively for the purchase of BMW vehicles. We have been advised by your bank, Israel Discount Bank Ltd., that on several occasions during 1978, most recently on November 21, 1978, your wholesale credit line could not accommodate the purchase of additional BMW vehicles. However, during this period the aggregate purchase price of BMW vehicles purchased by you from us during any calendar month was below the amount of your minimum wholesale credit line.

Our records also indicate that although a total of 90 BMW vehicles has been made available to you during the period from January 1, 1978 to November 2, 1978, you have purchased only 50 BMW vehicles from us. Of the 40 BMW vehicles refused, seven constituted your full allocation of 1979 model-year BMW vehicles. Consequently, it appears that you have used your minimum wholesale credit line, which was to be used only for the purchase of BMW vehicles, for other purposes.

We were informed on December 8, 1978 that you established a wholesale line of credit with the Lloyd Capital Corp. in the amount of $400,000. You assured us that this line of credit would be used exclusively for the purchase of BMW vehicles and, accordingly, you would be able to purchase and maintain an appropriate model range consistent with your current Dealer Operating Requirements Agreement.

On the strength of the Lloyd floor plan committment letter dated December 7, 1978, we allocated 28 new BMW vehicles to your dealership. Between December 13 and 14, nine of these vehicles were delivered to your dealership. On December 15, we were contacted by Mr. Ken Block of Lloyd Capital who called to inform us that the line of credit issued to Bavarian had been in response to Mr. Eichler's request that such a letter be provided to

BMWNA. It was clear from Mr. Block's comment that he had not anticipated that the line of credit would be drawn upon immediately. In that same conversation Mr. Block advised that your line of credit with his institution had been cancelled and that we would receive confirmation of this in writing. Today we received a mail-gram from Mr. Block confirming cancellation of the line. Based on this information, we had no alternative but to arrange for the pickup of these nine cars on Friday. Obviously this resulted in a significant inconveneince and additional cost to our company.

The cancellation of this line together with the inadequacy of the Israel Discount Bank line of credit effectively prohibits your dealership from meeting its obligations under your current BMW Operating Requirements Agreement.

2. *Impairment of Financial Reputation*—Paragraph 3(b) of Dealer Standard Provisions.

We are aware, of course, that you have chosen from time to time to supplement your inventory of new BMW vehicles through direct purchases from other authorized BMW dealers. Although we have no objections to this practice, we have been advised by four of these selling dealers that your checks to these dealers have been dishonored by your bank due to insufficient funds. Moreover, when you failed to make payment after repeated requests, these dealers requested that we assist them in the collection of the monies owed to them.

Despite our efforts to resolve this situation, including conversations and meetings with you dating from September 26, 1977, you have continued to "bounce" checks to other BMW dealers in connection with the purchase of BMW vehicles, most recently in September 1978.

We wish to inform you that any checks "bounced" in the future will not be tolerated.

3. *Parts Account Arrearages*—(Articles 7(s) and 8(b) of the Dealer Standard Provisions).

Although payment for your purchases of BMW parts must be made promptly, you have frequently permitted your parts account to become overdue and in a number of instances have made payment by checks which were dishonored by your bank due to insufficient funds. We have discussed this situation with you a number of times and have advised you by Mr. Scelsi's letter of July 7, 1977 and by Mr. Pokorny's letter of April 11, 1978 of your delinquent status and of the necessity of complying with our payment requirements. Moreover, in an attempt to assist you in resolving this situation, we have even extended, at your request and as an accommodation to you, the time for payment of your parts account balance during the summer of 1978.

Your history of arrearages has caused us to suspend your open account privileges from time to time and to require that your purchases be made on a C.O.D. basis. Most recently, on September 26, 1978, your continued late payments and dishonored checks and our ignorance with respect to your financial condition (as discussed in point 5 below) again caused us to place your parts account on a C.O.D. basis.

On Friday, December 15, we were advised by our bank that a check you had presented to our Parts Department the previous week, in payment of a C.O.D. parts pickup, was dishonored due to an uncertified check at this time while you were on certified check, C.O.D. basis. This was not meant to reflect a change in our requirements for your dealership, but was yet another accommodation to you.

The inadequacy of the check presented is yet another demonstration of your failure to comply not only with the terms and conditions of the BMW Dealer Agreement but with the spirit of our agreement as well.

4. *Failure to Observe Parts Inventory Requirements*—(Paragraphs 6(b) and 8(g) of the Dealer Standard Provisions and Article V(c) of your 1978 Dealer Operating Requirements Agreement).

Pursuant to your 1978 Dealer Operating Requirements Agreement, you agreed to maintain an inventory of BMW parts in adequate quantity and assortment to meet customers' requirements. On November 29, 1978, we were contacted by a customer whose BMW vehicle had been in your service department for approximately six weeks pending installation of a new transmission. You informed us that this delay was due to your lack of the necessary parts as a result of your inability to accept a C.O.D. delivery of such parts or to pay for such parts by certified check. To assist this customer, we were obligated to ship the parts to you on an open account basis notwithstanding the current C.O.D. status of your parts account.

Clearly, you are unable to fulfill the obligations of a BMW dealer to provide prompt service for owners of BMW vehicles if you cannot maintain an adequate inventory of BMW parts as a result of your inability to make payments for such parts.

5. *Submission of Financial and Operating Statements*—(Paragraph 10(b) (1) of the Dealer Standard Provisions).

Pursuant to the abovementioned Paragraph of the Dealer Standard Provisions, you have undertaken to provide us with both monthly and certified year-end financial

and operating statements. You have failed to comply with the requirement to submit certified year-end financial and operating statements since 1975 and have frequently been delinquent in supplying monthly financial and operating statements. Moreover, even when you have provided us with monthly financial and operating statements, such statements have not appeared to accurately reflect your true financial condition, especially in light of the status of your parts account and the frequency of dishonored checks. Accordingly, we have been unable to develop operating statistics for your BMW operations or to assess your financial status and the adequacy of your financial management. This situation also has precluded us from offering concrete suggestions and assistance with respect to your current operations as well as with respect to future planning.

Various BMW personnel have met with you on a number of occasions to discuss the deficiencies cited above and the actions which would have to be taken by you to rectify these deficiencies. To date, our efforts have not resulted in the satisfactory correction of your deficiencies.

However, if you are interested in continuing as a BMW dealer, please contact us by January 5, 1979 to discuss with you in greater detail the deficiencies cited above and the action which would have to be taken by you in order to rectify such deficiencies. If we can reach a satisfactory understanding with respect to these matters, we will send you a written confirmation of our intention to offer you a 1979 dealer agreement, which confirmation will set forth in detail the deficiencies to be rectified, the corrected measures to be taken and the time period in which this may be accomplished.

Should we fail to hear from you by the 5th of January, please be advised that we shall consider your failure to respond as a voluntary termination to our relationship.

In the event of such termination, we wish to inform you that we are prepared to fulfill our repurchase obligation in accordance with Paragraph 13 of the Dealers Standard Provision.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

BMW OF NORTH AMERICA, INC.
FRIEDRICH HANAU,
Vice President
Automotive Operations

FH:mw

Certified Mail
Return Receipt Requested
No. 657561

APPENDIX E.

Inter-Branch Memo, J. G. Trontell to R. T. Cronin, Dated September 1, 1978.

BMW *Inter-Branch Memo* T. SCELSI

To: R. T. Cronin Date: September 1, 1978

From: J. G. Trontell Re: Bavarian Auto Sales—Woodside, NY

On August 30, 1978, Andy Pokorny, Tony Scelsi, and I conducted a joint visit with Hans Eichler, President of Bavarian Auto Sales.

The purpose of this visit was to discuss the proper conduct of business relationships at Bavarian Auto Sales, with particular emphasis focused on their relevance to BMW of North America, Inc.

Specific topics of discussion were:

1) The increase of available floor plan funds to ensure a free and unencumbered $400,000 line. (sixty-day deadline)

2) Realignment with the banking institution of Bavarian's choice to achieve the desired floor line. (Marine Midland or First National City)

3) Relocation and consolidation of the split facility. (sixty-day deadline)

4) Strict compliance with policies and procedures as delineated in the BMW of North America, Inc., contract provisions. (immediate)

5) Reconciliation of delinquent accounts with members of the BMW dealer body, and its vendors, which would adversely affect, or involve, BMW of North America, Inc. (immediate)

The intent of this discussion was to ensure that in the ensuing sixty day period following the meeting, Bavarian Auto Sales would once again become a viable point in the BMW dealer network.

Should these topics not be reconciled in the specified period, BMW of North America would review the viability and potential longevity of Bavarian Auto Sales in the dealer body.

JOHN G. TRONTELL